Supreme Court, U. S.
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No. 76-913

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM FISHER, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Acting Solicitor General,

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OPINION BELOW

The order of the court of appeals (Pet. App. A) is noted at 540 F. 2d 1083.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1976. A petition for rehearing with suggestion of rehearing *en banc* was denied on December 1, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on December 31, 1976. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the prosecutor improperly failed to inform petitioner of evidence allegedly relevant to the credibility of a government witness.

2. Whether 21 U.S.C. 841(a)(1) is unconstitutionally vague.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of 23 counts charging distribution of controlled substances, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to concurrent terms of three years' imprisonment, with all but 60 days of the term suspended in favor of 34 months' supervisory probation, to be followed by two years' special parole pursuant to 21 U.S.C. 841(b)(1)(B). He was also fined $10,000 on each of the first five counts. Petitioner was further ordered to close his office and surrender his license to practice medicine as well as his narcotics permit.

After petitioner's conviction, he made a motion for a new trial based upon the alleged failure of the United States to disclose information relevant to the credibility of one of its witnesses. Following a hearing,[1] the district court denied the motion (Pet. App. 3a). The court of appeals affirmed *per curiam* (Pet. App. 1a).

Briefly, the evidence at trial showed that between April 2, 1974, and June 18, 1974, petitioner wrote 23 prescriptions for various amphetamines and other controlled substances (*e.g.*, Tr. 141-146, 184-187, 209-210). The prescriptions were requested by three undercover agents of the Drug Enforcement Administration. The agents, who met separately with petitioner, stated initially that they wanted drugs to stay awake, go to sleep, or for friends (*e.g.*, Tr. 142-144, 185, 209-210). Petitioner conducted cursory physical examinations of the agents, measuring only their height, weight, and blood pressure (Tr. 143, 187, 210). After the initial office visits, petitioner

[1] We are lodging a transcript of the hearing on the motion for a new trial ("Hearing Tr.") with the Clerk of this Court.

made no further physical examinations (Tr. 157, 195-196, 217). The agents were not asked about their health, nor did they state that they were suffering from any illness (Tr. 157-158, 196, 217-218).

Two expert witnesses, Dr. John Andrianni and Dr. George Bailey, testified that petitioner prescribed a substantially greater quantity of drugs during the period involved than could be used for any legitimate medical purposes (Tr. 257-258, 270-272, 278, 338-340, 345-346). In their opinion, petitioner's conduct fell outside legitimate medical practice (Tr. 248-279, 334-351, 357). Two doctors testified as experts on petitioner's behalf that petitioner's conduct was within the course of professional practice (Tr. 380-384, 437-438, 447-449).

ARGUMENT

1. Petitioner claims (Pet. 10-12) that the prosecutor improperly failed to disclose evidence affecting the credibility of one of its expert witnesses, Dr. Bailey. Prior to petitioner's trial, Bailey was the victim in a land fraud scheme for which one Robert Pilotte was federally prosecuted in the Eastern District of Louisiana. Pilotte had informed Bailey that he would make restitution of the amount defrauded, if the fraud charges were dismissed. Bailey communicated that information to Assistant United States Attorney James O'Connor, who informed Bailey that the prosecution would not be dismissed. Shortly thereafter, Bailey was contacted with regard to his testimony in the present case, which was prosecuted by Assistant United States Attorney Ronald Fonseca. Pilotte pleaded guilty to the fraud charges more than two weeks prior to petitioner's trial and was sentenced to a term of 30 months' imprisonment. *United States* v. *Pilotte*, No. 74-393(D) (E.D. La.), filed July 14, 1975.

Petitioner claims that Dr. Bailey had an interest in testifying favorably for the government in the hope of

influencing the United States Attorney's decision-making in Pilotte's case. Petitioner's factual claim is without substance. Pilotte's offer to Bailey depended upon dismissal of the fraud charges (Hearing Tr. 14). Not only were the charges not dismissed, but Pilotte pleaded guilty prior to petitioner's trial. Whatever interest Bailey might have had in pleasing the prosecutors expired weeks before he testified against petitioner. Because the *Pilotte* matter could not have been affected by Bailey's testimony, the prosecutor had no duty to disclose Bailey's dealings with Pilotte, which did not constitute material exculpatory evidence. See *United States* v. *Agurs*, No. 75-491, decided June 24, 1976; *Brady* v. *Maryland*, 373 U.S. 83, 87.

For the first time, petitioner now claims (Pet. 8, 11) that Pilotte made an additional offer to Bailey that restitution would be made if Bailey persuaded the United States Attorney to recommend probation for Pilotte. Petitioner argues that *Giglio* v. *United States*, 405 U.S. 150, required the United States Attorney to disclose this interest. We are unable, however, to find any evidence in the record supporting petitioner's present description of Pilotte's offer to Bailey, and petitioner cites nothing. In fact, at the post-trial hearing into this matter (when Bailey apparently was available and could have been, but was not, called to testify regarding the subject) petitioner's counsel proposed a stipulation regarding Bailey's testimony to the effect that Pilotte told Bailey "that if Dr. Baley [sic] exerted his influence on the U.S. Attorney's Office to drop the charges Mr. Pillot [sic] would make restitution" (Hearing Tr. 15). There was no suggestion that Pilotte was continuing to exert pressure on Bailey to intervene with the prosecutors at the time of petitioner's trial, when Pilotte already stood convicted, or that his pressure ever extended to matters of sentencing, or, if

it did, that the prosecutors were aware of that fact. Thus, there is plainly no basis for review of this unsubstantiated claim in this Court.

Moreover, while the matter would of course be one for determination by the district court in the first instance, it is hard to see how petitioner would be entitled to a new trial even if his present factual assertions could be substantiated. Unlike *Giglio*, this case involved no false testimony of any kind by the prosecution's witness, Dr. Bailey. And Bailey's testimony, while no doubt of importance, was not critical to the government's case, as was that of the witness in *Giglio*. The facts of the drug distributions were established by the testimony of the narcotics agents involved, and Bailey's expert opinion testimony was duplicated by that of another expert medical witness. Under the circumstances, it is difficult to see how the petitioner's speculations about the marginally impeaching information regarding dealings between Pilotte and Bailey could be found to create "a reasonable doubt that did not otherwise exist." *United States* v. *Agurs*, *supra*, slip op. 15.

2. Petitioner further alleges that Section 401(a)(1) of the Controlled Substances Act, 84 Stat. 1242, 1260, 21 U.S.C. 841(a)(1), is unconstitutionally vague when applied to registered physicians. He urges that the statute does not give notice to a physician as to which conduct will fall outside "the course of professional practice." 21 U.S.C. 802(20). The claim, however, is merely "another statement of * * * [the] contention that Congress did not intend that doctors registered under [the Controlled Substances Act] * * * should be punished under Section 841." *United States* v. *Rosenberg*, 515 F. 2d 190, 193 (C.A. 9), certiorari denied, 423 U.S. 1031. This issue was resolved adversely to petitioner's position by this Court in *United States* v. *Moore*, 423 U.S. 122, and no reason exists to reconsider that decision now.

In any event, the requirement that registered doctors prescribe drugs only in the course of legitimate medical practice is not impermissibly vague. *United States* v. *Rosenberg, supra*, 515 F. 2d at 197-198; *United States* v. *Collier*, 478 F. 2d 268, 271-272 (C.A. 5). Whether particular treatments fall within the "course of professional practice" is a judgment routinely required of physicians. See *Doe* v. *Bolton*, 410 U.S. 179, 191-192; *United States* v. *Vuitch*, 402 U.S. 62, 71-72.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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